

1 Elaine T. Byszewski (SBN 222304)  
2 Lee M. Gordon (SBN 174168)  
3 HAGENS BERMAN SOBOL SHAPIRO LLP  
4 301 North Lake Avenue, Suite 203  
5 Pasadena, CA 91101  
6 Tel. (213) 330-7150  
7 Fax (213) 330-7152  
8 E-mail: elaine@hbsslaw.com

6 Robert B. Carey (*pro hac vice*)  
7 HAGENS BERMAN SOBOL SHAPIRO LLP  
8 11 West Jefferson Street, Suite 1000  
9 Phoenix, AZ 85003  
10 Tel. (602) 840-5900  
11 Fax (602) 840-3012

10 Steve W. Berman (*pro hac vice*)  
11 HAGENS BERMAN SOBOL SHAPIRO LLP  
12 1918 Eighth Avenue, Suite 3300  
13 Seattle, WA 98101  
14 Tel. (206) 623-7292  
15 Fax (206) 623-0594

14 *Attorneys for Plaintiffs and the Class*

15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 CHRISTOPHER KEARNEY, NANCY  
18 KEARNEY, CHARLES MOORE, and  
19 SHARI MOORE,

20 Plaintiffs,

21 v.

22 HYUNDAI MOTOR AMERICA,

23 Defendant.

No. SACV09-01298 JST (MLGx)

**MEMORANDUM IN SUPPORT OF  
MOTION FOR AN AWARD OF  
ATTORNEYS' FEES, EXPENSES,  
AND INCENTIVE AWARD  
PAYMENTS**

**CLASS ACTION**

**Date: June 7, 2013**

**Time: 2:30 p.m.**

**Judge: Hon. Josephine Staton Tucker**

**Courtroom: 10A**

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1 Plaintiffs Christopher Kearney, Nancy Kearney, Charles Moore, and Shari  
 2 Moore (“Plaintiffs” or “Class Representatives”), by and through Class Counsel,  
 3 respectfully submit this memorandum in support of their motion for an award of  
 4 attorneys’ fees, expenses, and incentive award payments for their hard work and skill  
 5 in this litigation and securing a favorable result on behalf of the Settlement Class.<sup>1</sup>  
 6

## 7 **I. INTRODUCTION**

8 Class Counsel believe that they have achieved an excellent result for the Class  
 9 of current owners and lessees of certain model-year Hyundai Sonata, Santa Fe, and  
 10 Azera vehicles (the “Class Vehicles”), in which the front-passenger-side Occupant  
 11 Classification System (“OCS”) is alleged to be defective by not consistently  
 12 recognizing small-statured adults, causing deactivation of the passenger-side air bag  
 13 when such persons occupied the front passenger seat. The Settlement Agreement led  
 14 to an additional 265,000 Class Vehicles being eligible for an updated calibration,<sup>2</sup> as  
 15 well as a possible refund of the vehicle purchase price or exchange of the vehicle.  
 16 According to Hyundai Motor America (“HMA”), the estimated value of the Santa Fe  
 17 recall alone, just for labor, is approximately \$2.5 million to date.<sup>3</sup> This amount does  
 18 not include the cost HMA incurred in developing the calibration software, the Sonata  
 19  
 20  
 21  
 22

23 <sup>1</sup> All capitalized terms shall have the same meanings set forth in the August 15,  
 24 2012 Settlement Agreement attached hereto as Exhibit 1.

25 <sup>2</sup> The prior recall campaign issued by HMA only included 2006-2008 Sonatas.  
 26 Based on the parties’ settlement negotiations, HMA voluntarily launched a recall in  
 2012 to make the Santa Fe OCS calibration available to each owner of a model year  
 2007-2009 Hyundai Santa Fe vehicle produced from April 19, 2006, to July 7, 2008.

27 <sup>3</sup> See Declaration of Robert B. Carey in Support of Motion for an Award of  
 28 Attorneys’ Fees, Expenses, and Incentive Award Payments (“Carey Decl.”) ¶ 2,  
 attached hereto as Exhibit 2.

1 recalibration work, or the other benefits under the Settlement. (Carey Decl. ¶ 3.)  
 2 Additionally, 646,734 Class Members were sent notice of the settlement by HMA,<sup>4</sup>  
 3 which educated them about a potential safety issue that might be not obvious—that  
 4 there was an issue with the proper functioning of the OCS, not merely with the air-  
 5 bag indicator light.<sup>5</sup> At \$0.46 per notice, this cost, paid for by HMA, is \$297,497.64.  
 6 A conservative estimate would be: (1) the cost HMA incurred in developing the  
 7 calibration software is \$1 million, (2) 500 Class Members participate in the  
 8 buyback/exchange program at about \$2,000 per person, and (3) 100 Class Members  
 9 utilize the arbitration option at approximately \$1,500 per arbitration, that constitutes  
 10 another \$2,150,000 worth of value to the Class. This indicates that the total cash  
 11 value of the Settlement could exceed \$4.9 million. (Carey Decl. ¶ 2.)  
 12  
 13  
 14  
 15

16 After the Settlement Agreement was signed, the parties engaged the Honorable  
 17 Stephen J. Sundvold (Ret.) to mediate an award of attorneys' fees and expenses for  
 18 Class Counsel. (*Id.* ¶ 3.) Notably, Sections 9.1 and 9.2 of the Settlement Agreement  
 19 directed that the amount of Plaintiffs' reasonable attorneys' fees and expenses,  
 20 including reasonable incentive awards for Class Representatives, be negotiated and  
 21 agreed upon separately by the parties, "only after reaching agreement on all other  
 22 material terms of this settlement." (*See* Exhibit 1, §§ 9.1, 9.2.) The parties  
 23  
 24

25 <sup>4</sup> *See Finkel v. Am. Oil & Gas, Inc.*, No. 10-cv-01808-CMA-MEH, 2012 WL  
 26 171038, at \*2 (D. Colo. Jan. 20, 2012) ("Attorneys' fees may be awarded following  
 27 class-action settlements where a non-monetary benefit is conferred on the class.").

28 <sup>5</sup> *See* Exhibit 2 to the parties' Joint Motion for Final Approval of Class Settlement  
 (Declaration of Jason R. Erb ¶ 3).



1 submitted confidential mediation statements to Judge Sundvold, and Class Counsel's  
 2 submission included exhibits of their billing statement reflecting details of the work  
 3 performed and their then-current lodestar and expenses and a discussion of the post-  
 4 settlement efforts that would be required. (Carey Decl. ¶ 3.) The parties then  
 5 participated in a mediation session in Orange, California, on August 28, 2012. (*Id.*)  
 6 After vigorously mediating, the parties could not reach agreement. Judge Sundvold  
 7 then made a "mediator's recommendation," and after additional discussion between  
 8 the parties, HMA agreed to pay Class Counsel a total of \$993,000.00 in attorneys'  
 9 fees and expenses.<sup>6</sup> (*Id.*)

13 The agreed-upon award of \$993,000 represents Class Counsel's expected  
 14 lodestar totals \$922,605.00, a figure that includes case-completion obligations,  
 15 \$45,855.71 in expenses incurred, and expected future expenses of \$12,000. (Carey  
 16 Decl. ¶¶ 4-7.) Though the parties' good-faith estimate of the finish-line lodestar  
 17 should result in no multiplier, in the event the final lodestar is less than projected, the  
 18 negotiated attorneys' fees is still well within the 3-4 multiplier commonly awarded in  
 19 the Ninth Circuit and the Central District of California. *See Vizcaino v. Microsoft*  
 20 *Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002); *Van Vranken v. Atlantic Richfield Co.*,  
 21 901 F. Supp. 294, 298 (N.D. Cal. 1995). The \$993,000 award is fair to reward Class  
 22 Counsel for their hard work and success in achieving a great result for the Class.

26  
 27 <sup>6</sup> This Court may give considerable weight to the mediation recommendation in  
 28 determining whether the fee award is reasonable. *See Hanlon v. Chrysler Corp.*, 150  
 F.3d 1011, 1029 (9th Cir. 1998).

1 Finally, HMA agreed to pay \$2,500 to each of the four Class Representatives,  
2 Christopher Kearney, Nancy Kearney, Charles Moore, and Shari Moore, as an  
3 incentive award for their time and effort in the Litigation. (Carey Decl. ¶ 3.) The  
4 Class Representatives have been available for multiple conferences, provided  
5 information for their disclosures and other pleadings, and Plaintiff Nancy Kearney  
6 gathered information from other Hyundai owners to demonstrate that the OCS defect  
7 was a common issue that was affecting a large number of people. (*Id.* ¶ 8.) As with  
8 Class Counsel's fees and expenses, these incentive awards were negotiated  
9 separately from and after the material terms of the Settlement, and they will not  
10 affect the amount of relief available to the Settlement Class. (*See* Exhibit 1, § 9.2.)

11 For the reasons set forth herein, Plaintiffs respectfully submit that their  
12 requested award of \$993,000 for attorneys' fees and expenses, and \$2,500 incentive  
13 award payments, is reasonable under Ninth Circuit case law and should be fully  
14 awarded by this Court pursuant to the parties' agreement.

## 15 **II. HISTORY OF LITIGATION**

### 16 **A. Plaintiffs' Investigations**

#### 17 **1. Plaintiffs Christopher and Nancy Kearney<sup>7</sup>**

18 Plaintiffs Christopher and Nancy Kearney purchased a 2006 Hyundai Sonata  
19 with an OCS, and they noticed that when Plaintiff Nancy Kearney (who is 5'7" and  
20

---

21 <sup>7</sup> *See generally* Declaration of Christopher and Nancy Kearney in Support of  
22 Supplemental Brief regarding Certification of Settlement Class ("Kearneys' Decl."),  
23 Dkt. 82.  
24

1 weighs 115 pounds) sat in the front passenger seat, the PASSENGER AIR BAG  
2 OFF lamp on the dashboard indicates that the passenger front air bag is deactivated.

3 Plaintiff Christopher Kearney took their Sonata into their local Hyundai dealer  
4 multiple times regarding the issue. The first time they were in for service, the dealer  
5 saw that the light came on when a 190-pound person sat in the passenger seat, so the  
6 dealer removed the passenger seat cushion and sent it to an evaluation and repair  
7 facility in California.  
8

9 The Kearneys still found that the OCS was shutting off the passenger-side air  
10 bag when Nancy Kearney sat in the passenger seat. The dealer said “a new car” was  
11 the fix, but the dealer and HMA did not take the car back. Nancy Kearney called  
12 Hyundai USA in July 2009 about the problem and only then did she learn there had  
13 been a recall involving the Sonata’s OCS.  
14

## 15 **2. Plaintiffs Charles and Shari Moore<sup>8</sup>**

16 Plaintiffs Charles and Shari Moore purchased a 2008 Hyundai Santa Fe with  
17 OCS and advanced air bags. Their daughter, Melissa Merriman, is 5’7” and weighs  
18 approximately 117 pounds. On December 26, 2008, Plaintiff Shari Moore was  
19 driving in the Santa Fe with Melissa sitting in the front passenger seat when they  
20 were hit by a drunk driver in a head-on collision. Shari’s air bag deployed, but  
21 Melissa’s did not. Melissa’s head went through the windshield, and she suffered  
22 serious injuries. The Santa Fe was totaled, but since it was only weeks old at the  
23 time of the accident, the Moores obtained another 2008 Hyundai Santa Fe. The  
24 Moores have observed that the PASSENGER AIR BAG OFF lamp illuminates when  
25

26 <sup>8</sup> See generally Declaration of Charles and Shari Moore in Support of  
27 Supplemental Brief regarding Certification of Settlement Class (“Moores’ Decl.”),  
28 Dkt. 83.

1 their daughter or another small-stature adult sits in the front passenger seat even in  
2 their replacement 2008 Hyundai Santa Fe.

### 3                   **3.     Class Counsel's Investigation**

4                   In approximately July 2009, Plaintiffs Christopher and Nancy Kearney  
5 requested that Class Counsel investigate the possible OCS defect in Sonatas. (Carey  
6 Decl. ¶ 9.) Class Counsel undertook an intensive investigation and discovered  
7 Hyundai's OCS did not accurately determine whether the front-passenger-seat  
8 occupant is a small-statured adult and based on its inaccurate determination, the OCS  
9 deactivated the air bag. (*Id.* ¶ 10.) Hyundai owners would not be aware of even the  
10 existence of this defect until they had a small-statured adult as a front-seat passenger.  
11 (*Id.*) But HMA was aware of this defect—it notified the National Highway Traffic  
12 Safety Administration ("NHTSA") of its voluntary recall on April 1, 2008, for 2006-  
13 2008 Sonatas produced from March 1, 2005, to January 11, 2008, to recalibrate the  
14 OCS in those vehicles.  
15

16                   Class Counsel discovered that many owners of various Hyundai models  
17 complained on Internet forums and filed complaints with NHTSA related to the OCS  
18 misclassification issue. (*Id.*) The nature of the complaints indicated that the defect  
19 included various Hyundai models equipped with OCS, yet HMA failed to disclose  
20 the defect, and its recall did not resolve the OCS issue. (*Id.*) Therefore, on  
21 November 6, 2009, Class Counsel filed this action on behalf of Plaintiffs Christopher  
22 and Nancy Kearney and a putative class in the United States District Court for the  
23 Central District of California, asserting that HMA and Hyundai Motor Company  
24 ("HMC") defectively designed the OCS of 2006-2009 model-year Hyundai vehicles,  
25  
26  
27  
28

1 leading the OCS to inconsistently recognize small-stature adults by illuminating the  
2 “PASSENGER AIR BAG OFF” light.<sup>9</sup> (See Complaint, Dkt. 1.)

3 **B. The Defective Class of Vehicles**

4 According to NHTSA’s Office of Defects Investigation (“ODI”), the recall for  
5 393,308 model year 2006-2008 Sonatas equipped with OCS was reported on April  
6 10, 2008. The recall stated “the misclassification of a small stature adult as a child in  
7 the right front passenger seat may cause the right front air bag to not inflate in an  
8 accident that merits air bag deployment and may result in injury to the right front  
9 occupant.” The remedy under the recall was that Hyundai dealers would verify that  
10 the OCS did not accurately recognize a properly seated adult occupant, and they  
11 would ship the right front seat cushion assembly to an evaluation and repair facility  
12 for evaluation, repair, and/or reprogramming of the seat and OCS as necessary.  
13

14  
15 But the defect extended to other Hyundai models that contained OCS. By  
16 reviewing information from NHTSA and data from HMA, Class Counsel determined  
17 the Hyundai vehicles that manifested an aberrant rate of OCS-classification incidents  
18 using objective factors. (*Id.* ¶ 11.) These vehicles include the following:

- 19
- 20 ■ Model Years 2006 through 2008 Hyundai Sonata vehicles;<sup>10</sup>
  - 21 ■ Model Years 2007 through 2009 Hyundai Santa Fe vehicles produced  
22 from April 19, 2006 through July 7, 2008;<sup>11</sup> and

23  
24 <sup>9</sup> Plaintiffs Charles and Shari Moore contacted Class Counsel in December 2009  
25 about their accident in which their 2008 Santa Fe’s front passenger-side air bag did  
26 not deploy despite their adult daughter being seated there. (Carey Decl. ¶ 9.) They  
were added as Class Representatives in the First Amended Complaint (“FAC”), filed  
on January 8, 2010. (Dkt. 11.) HMC was removed as a Defendant in the FAC. (*Id.*)

27 <sup>10</sup> The Sonata vehicle population is approximately 395,000, and the complaint  
28 rate was a relatively high 0.041% (approximately 161 complaints). (Carey Decl. ¶  
11.)

- Model year 2006 through 2009 Hyundai Azera vehicles.<sup>12</sup>

These vehicles contain an OCS with either a MAT or a PODS system type, but regardless of the system type, the OCS experiences the same deficiency—the nonrecognition of small-stature adults. (*Id.* ¶ 12.) Class Counsel discovered that the other Hyundai models had levels of misclassification that were substantially lower, so those vehicles were not pursued. (*Id.*)

### C. The August 15, 2012 Settlement

After surviving HMA’s second motion to dismiss, Class Counsel negotiated the proposed settlement to expand the number of owners or lessees who would be eligible for the recalibration of the OCS and the scope of the benefits to Class Members. (*Id.* at 13; Exhibit 1, § 3.) Based on Class Counsel’s suit, HMA agreed to provide the updated OCS calibration on Santa Fes as one of the settlement benefits, and 2006-2009 Azeras were added as Class Vehicles. (Carey Decl. ¶ 13.) The Settlement also provides all Class Members with a potential buyback or exchange program if they remain unhappy with the OCS’s performance and meet certain eligibility requirements, and the opportunity to arbitrate their eligibility in the program if HMA refuses to refund their purchase price. (*See* Exhibit 1, §§ 4-5.)

This additional eligibility for benefits under the proposed Settlement applies in several circumstances and vastly expands the number of consumers (by roughly 265,000) to whom this relief is available:

Hyundai Vehicle	Recall	Class Settlement Improvements
-----------------	--------	-------------------------------

<sup>11</sup> The Santa Fe vehicle population is approximately 199,000, and the complaint rate was 0.024% (approximately 67 complaints). (*Id.*)

<sup>12</sup> The Azera vehicle population is approximately 66,000, and the complaint rate was 0.012% (approximately 8 complaints). (*Id.*)

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	2006-2008 Sonatas	2008 recall: Dealers will verify that the OCS does not properly recognize a properly seated adult occupant. After verification, dealers will remove the right front seat cushion assembly and ship it to an evaluation and repair facility. This facility will evaluate and repair or reprogram the seat cushion and OCS as necessary.	Class Members will receive recalibration of the OCS performed free of charge pursuant to the recall (if not already performed); <b>and</b>  HMA will mail Class Members a sticker for the glove compartment door (or the Owner's Manual) advising future owners that the OCS has been recalibrated and an explanatory cover letter; <b>and</b>  HMA will update the TSB associated with the recall to reflect that authorized Hyundai dealers performing the OCS recalibration should apply a sticker to the inside of the glove compartment door (or the Owner's Manual) advising future owners that the OCS has been recalibrated; <b>and</b>  HMA will mail Class Members a pamphlet that provides information about the OCS and its operation.
18 19 20 21 22 23 24 25 26	2007-2009 Santa Fes produced April 19, 2006 through July 7, 2008	2012 recall: Hyundai will notify owners, and dealers will update the classification software free of charge.	Prior to initiating the 2012 recall, HMA agreed to provide the updated OCS calibration as one of the settlement benefits.  Class Members will receive updated calibration of the OCS performed free of charge pursuant to the recall (if not already performed); <b>and</b>  HMA will mail Class Members a pamphlet that provides information about the OCS and its operation.
27 28	2006-2009 Azeras	No recall issued; no fix available for OCS	HMA will mail Class Members a pamphlet that provides information



		about the OCS and its operation.
All Class Vehicles if Class Members remain unsatisfied with performance of OCS	N/A	<p>Class Members may be eligible for a potential repurchase or vehicles exchange program if certain requirements are met and subject to certain conditions; <b>and</b></p> <p>If a Class Member receives a refund offer from HMA and sells the vehicle in an arms-length transaction at a price greater than the refund price offered by HMA within 60 days and submit supporting documentation, HMA will pay the Class Member \$500; <b>and</b></p> <p>If a Class Member is still unsatisfied with the OCS and HMA is unwilling to refund the vehicle's purchase price, the Class Member may initiate an arbitration by the Better Business Bureau or a similar entity within 30 days after the 90-day period HMA had to resolve the Class Member's concerns; <b>and</b></p> <p>If the arbitrator agrees that the Class Member has satisfied the Refund/Exchange Conditions, HMA will refund the purchase price of the Class Member's vehicle (or exchange it for another Hyundai model) subject to certain conditions, and HMA will bear the expense of the arbitration.</p>

(See Exhibit 1, §§ 3-5.)



1 First, the eligibility for Settlement benefits extends to owners of certain model  
2 year Santa Fe and Azera vehicles—not just Sonatas. Second, the recall on the OCS  
3 in Santa Fe vehicles was a direct result of settlement negotiations, and the updated  
4 calibration of the OCS would have been a benefit offered under the Settlement  
5 Agreement had HMA not voluntarily issued the recall. Third, all Class Members,  
6 regardless of what type of Class Vehicle they own, may be eligible for a possible  
7 refund of their vehicle’s purchase price or an exchange of their vehicle for another  
8 Hyundai vehicle if they meet the eligibility requirements. Another significant  
9 benefit offered to Class Members under the Settlement is the opportunity to pursue  
10 arbitration if the Class Member is denied eligibility in the repurchase program.  
11 Finally, Class Counsel’s position is that the Class notice also constitutes a value to  
12 Class members because it warns of a potential safety hazard.

13  
14  
15 **III. THE COURT SHOULD AWARD THE FULL AMOUNT OF**  
16 **ATTORNEYS’ FEES THAT HMA AGREED TO PAY**

17 **A. Applicable Legal Standards**

18 The Ninth Circuit “has affirmed the use of two separate methods for  
19 determining attorneys fees, depending on the case.” *Hanlon*, 150 F.3d at 1029. The  
20 district court has discretion to use either the percentage or lodestar method in  
21 common-fund cases, where benefits are distributed to class members from a large  
22 settlement fund. *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291,  
23 1294-95 (9th Cir. 1994). But in cases that do not involve common-fund settlements,  
24 “[t]his circuit requires a district court to calculate an award of attorneys’ fees by first  
25 calculating the ‘lodestar.’” *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1028  
26 (9th Cir. 2000).  
27  
28

1 The lodestar method yields a fee that is presumptively reasonable. *See Perdue*  
2 *v. Kenny A. ex rel. Winn*, 559 U.S. 542, 130 S. Ct. 1662, 1672-73 (2010). The first  
3 step in the lodestar method is to take “the number of hours reasonably expended on  
4 the litigation multiplied by a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S.  
5 424, 433 (1983). The lodestar may be adjusted up or down to account for other  
6 factors<sup>13</sup> which are not subsumed within it.<sup>14</sup> *Ferland v. Conrad Credit Corp.*, 244  
7 F.3d 1145, 1149 n.4 (9th Cir. 2001). Here, the Court should use the lodestar method,  
8 and, if necessary, apply a multiplier to award the amount HMA agreed to pay.  
9

10 **B. Under the Lodestar Method, Class Counsels’ Attorneys’ Fee**  
11 **Request Is Reasonable**

12 **1. Class Counsel’s Hourly Rates Are Reasonable**

13 Under the lodestar method, reasonable hourly rates are determined by  
14 “prevailing market rates in the relevant community.” *Blum v. Stenson*, 465 U.S. 886,  
15 895 n.11 (1984). These rates are in line with those commanded by lawyers of  
16 reasonably comparable skill, experience, and reputation. *Id.* at 895 n.11. “The  
17 relevant community is the forum in which the district court sits.” *Camacho v.*  
18 *Bridgeport Financial, Inc.*, 523 F.3d 973, 979 (9th Cir.2008).  
19

20 <sup>13</sup> The factors include “(1) the time and labor required, (2) the novelty and  
21 difficulty of the questions involved, (3) the skill requisite to perform the legal service  
22 properly, (4) the preclusion of other employment by the attorney due to acceptance  
23 of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time  
24 limitations imposed by the client or the circumstances, (8) the amount involved and  
the results obtained, (9) the experience, reputation, and ability of the attorneys,  
(10) the ‘undesirability’ of the case, (11) the nature and length of the professional  
relationship with the client, and (12) awards in similar cases.” *Kerr v. Screen Extras*  
*Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

25 <sup>14</sup> The factors already taken into account by the lodestar calculation are: “(1) the  
26 novelty and complexity of the issues, (2) the special skill and experience of counsel,  
27 (3) the quality of representation,...(4) the results obtained, and (5) the contingent  
nature of the fee agreement.” *Morales v. City of San Rafael*, 96 F.3d 359, 364 (9th  
28 Cir. 1996), *reh’g denied, amended on other grounds by* 108 F.3d 981 (9th Cir. 1997)  
(internal citations omitted).

1 Affidavits of the plaintiffs' attorney regarding prevailing fees in the  
2 community and rate determinations in other cases "are satisfactory evidence of the  
3 prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896  
4 F.2d 403, 407 (9th Cir. 1990). The district court may consider evidence of counsel's  
5 customary hourly rate. *See People Who Care v. Rockford Bd. of Educ., School Dist.*  
6 *No. 205*, 90 F.3d 1307, 1310 (7th Cir. 1996) (holding that an attorney's actual billing  
7 rate for similar work is presumptively appropriate).

9 Here, the hourly rates submitted by Class Counsel reflect their actual billing  
10 rates. (Carey Decl. ¶ 4.) Class Counsel are members of the bar with extensive  
11 experience in prosecuting complex litigation, including consumer class actions. (*Id.*  
12 at ¶ 1.) HMA is represented by well-respected national law firm, necessitating a  
13 high level of experience for success. Class Counsel's rates are appropriate for  
14 complex, nationwide litigation, with a range of \$325 to \$800; their legal assistants'  
15 rates range from \$150 to \$190. (*Id.* ¶ 4.)

17 Moreover, Class Counsel's hourly rates are comparable to those approved in  
18 this District, which range from \$450-1,000 for attorneys and \$160-250 for  
19 paralegals/law clerks. *See, e.g., Pierce v. County of Orange*, No. SACV 01-981  
20 ABC (MLGx), 2012 WL 5906663, at \*13-14 (C.D. Cal. Mar. 2, 2012); *Housing*  
21 *Rights Ctr. v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320738, at \*2 (C.D. Cal.  
22 Nov. 1, 2005).

24 Additionally, the National Law Journal ("NLJ") issues an annual survey of  
25 prevailing hourly rates in the nation's largest law firms, and courts rely on this  
26 survey as evidence of prevailing hourly rates. *See, e.g., Perdue*, 559 U.S. 542, 130  
27

1 S. Ct. at 1683 (Breyer, J., concurring in part, dissenting in part); *Parkinson v.*  
2 *Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010). According to the  
3 NLJ's 2012 Law Firm Billing Survey, Class Counsel's rates are comparable to the  
4 rates of California law firms, including HMA's counsel, Hogan Lovells.<sup>15</sup>  
5

6 Finally, Plaintiffs submit a sworn declaration by their counsel, attesting to  
7 their hourly rates and total hours devoted to the case, their experience, and describing  
8 their efforts to prosecute this case. (Carey Decl. ¶¶ 1, 3-4, 10-19.) Class Counsel's  
9 rates are reasonable, and when multiplied by the number of hours expended by Class  
10 Counsel, the result is a reasonable estimated lodestar of \$992,605.00. (*Id.* ¶ 4.)  
11

## 12 **2. The Number of Hours that Class Counsel Worked Is Reasonable**

13 The number of hours worked by Class Counsel to date and the estimated time  
14 to conclude the Litigation is reasonable. Class Counsel's cumulative lodestar  
15 through April 25, 2013, is \$665,605.00, which consists of 1,550 hours expended.  
16 (*Id.* ¶ 4.) Final Approval, however, is scheduled for June 7, 2013, and Class Counsel  
17 estimates they will need to be prepared to perform, at most, approximately 290  
18 additional hours to respond to Class Members' inquiries and objections, submit  
19 declarations from Class Members discussing their reactions to the proposed  
20 settlement, and file a brief in response to any objections by Class Members that also  
21 summarizes the administration of the Settlement to bring the Settlement before the  
22 Court for final approval. (*Id.* ¶ 16.) Class Counsel estimates an additional 580 hours  
23 as the top-of-range estimate of the hours necessary to attend to the issues that will  
24  
25

26 <sup>15</sup> See *The 2012 Law Firm Billing Survey*, NATIONAL LAW JOURNAL, Dec. 17,  
27 2012, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202581351631> (last  
28 visited Apr. 12, 2013) (stating Hogan Lovells' hourly rates are \$545-1,200 for partners and \$310-655 for associates).

1 arise during administration of the Settlement, field inquiries from Class Members  
2 regarding the Settlement, and walk Class Members through the buyback/exchange  
3 and arbitration processes to conclude the Litigation. (*Id.*) Thus, Class Counsel  
4 estimates that their total hours will eventually be close to 2,420 for a total cumulative  
5 lodestar of at least \$922,605.00. (*Id.* ¶ 4.)

7 Class Counsel expended significant time investigating the factual basis for the  
8 claims before drafting and filing the initial Complaint in the United States District  
9 Court, Central District of California, on November 6, 2009. Throughout the FAC,  
10 the Second Amended Complaint (“SAC”) (Dkt. 30), and the two rounds of full  
11 briefing on motions to dismiss Class Counsel vigorously opposed HMA’s arguments.  
12 (Carey Decl. ¶¶ 14-15.) Once the parties agreed to attempt to resolve the Litigation,  
13 Class Counsel worked for several months and had multiple meetings with HMA to  
14 negotiate the terms of the settlement at arms’ length, drafted the Settlement  
15 Agreement and Class Notice, together with preparing the proposed preliminary and  
16 final approval orders, and the preliminary approval and settlement Class motions and  
17 memoranda. (*Id.* ¶ 15.)

19 Class Counsel will also have to expend significant time leading up to the final  
20 approval hearing and after the Settlement is approved and implemented. In another  
21 similar case between Class Counsel and HMA regarding subframe corrosion of  
22 certain Hyundai vehicles,<sup>16</sup> Class Counsel has expended approximately 100 post-  
23 settlement-approval hours dealing with various class member issues—this  
24 represented roughly a 3% response rate from the class members. (Carey Decl. ¶ 17.)

27 <sup>16</sup> See *Cirulli v. Hyundai Motor America*, United States District Court for the  
28 Central District of California (No. SACV08-00854 AG (MLGx)).

1 To date, Class Counsel has received almost three times the inquiries regarding this  
2 Settlement than it did for the *Cirulli* settlement. (*Id.*) The *Cirulli* settlement offered  
3 a very limited buyback remedy if the subframe repairs exceeded the fair-market  
4 value of the vehicle. (*Id.*) Only a few class members partook of that remedy, and  
5 achieving resolution through communication and exchange of documents with those  
6 class members and counsel for HMA took several hours for each person. (*Id.*) This  
7 Settlement involves an alleged defect in the Class Vehicles' OCS—a safety issue  
8 that is an important concern for most vehicle owners and lessees—and the  
9 Settlement itself is more complex as it involves a much broader vehicle  
10 buyback/exchange program as well as an arbitration option. (*Id.*) For example, if a  
11 Class Member contacts Class Counsel about participating in the buyback/exchange  
12 program, Class Counsel will have to walk the Class Member through the program's  
13 eligibility requirements, ensure that they have had the recalibration recall performed  
14 (for Sonatas and Santa Fes), and communicate with the Class Member and HMA's  
15 counsel going forward to resolve the issue. (*Id.*) If the Class Member then wants to  
16 pursue arbitration, Class Counsel will again need to communicate and coordinate  
17 with the Class Member and HMA's counsel to arrange and complete the arbitration.  
18 (*Id.*) Therefore, Class Counsel believes that there will be a high rate of Class-  
19 Member inquiries and participation in the buyback/exchange program, and over three  
20 times as much time as in *Cirulli* spent by Class Counsel on each inquiry. (*Id.*)  
21 Based on the briefing that will take place before Final Approval, as well as the post-  
22 Settlement issues that are sure to arise, Class Counsel estimates it will expend 870  
23 hours to complete this Litigation. (*Id.* ¶¶ 4, 16.)  
24  
25  
26  
27  
28

1 This estimate is in line with the final lodestars in similar cases in this District.  
2 *See, e.g., Common Cause v. Jones*, 235 F. Supp. 2d 1076, 1078-79 (C.D. Cal. 2002)  
3 (3,345.8 attorney and staff hours generating a \$971,578.50 lodestar); *Marsikyan v.*  
4 *Mercedes-Benz USA, LLC*, No. 08-cv-04876, Order Granting Mot. Att'ys' Fees, May  
5 17, 2010 (C.D. Cal.) (2,900 hours generating a \$1,227,484 lodestar) (Exhibit 3);  
6 *Parkinson*, 796 F. Supp. 2d at 1173 (8,771 hours over four years of litigation  
7 generating final lodestar calculation of \$3,719,282.30). The hours that Class  
8 Counsel devoted to this case were reasonable and necessary—Class Counsel has  
9 furthered the Litigation and adequately represent the interests of the Class in the  
10 hard-fought settlement negotiations with HMA.  
11

12  
13 If the Court opts to award a multiplier instead of Class Counsel's expected  
14 final lodestar, that multiplier would likely be no more than 1.1, which is well below  
15 the multipliers commonly approved in this Circuit for similar cases.

16 **3. Class Counsel's Fees are Reasonable Pursuant to the *Kerr***  
17 **Factors Subsumed in the Lodestar Analysis**

18 In considering the reasonableness of attorneys' fees and any requested  
19 multiplier, courts consider the novelty and complexity of the litigation, counsel's  
20 skill and experience, the quality of representation, the results obtained, and the  
21 contingent nature of the fee agreement. *See Morales*, 96 F.3d at 364.

22 **(a) Novelty and Complexity of the Litigation**

23 The Complaint filed by Plaintiffs and Class Counsel on November 6, 2009,  
24 was the first lawsuit specifically regarding the OCS issue in Hyundai vehicles other  
25  
26  
27  
28



1 than just the Elantra.<sup>17</sup> The recall Hyundai issues for 2006-2008 Sonatas did not  
2 encompass any other Hyundai models that contained OCS, nor did it fix the OCS  
3 problem in the Sonatas.

4 Even though it acknowledged limitations in the OCS's design, HMA sought  
5 dismissal of the Litigation on a variety of grounds prompting the briefing of  
6 multiple, complex issues over two separate motions to dismiss. Class Counsel  
7 contested each of HMA's challenges and ultimately won relief for a vastly expanded  
8 Class of consumers throughout the United States.

9  
10 **(b) Skill and Experience of Class Counsel and Quality of**  
11 **Representation**

12 The "prosecution and management of a complex national class action requires  
13 unique legal skills and abilities." *In re Heritage Bond Litig.*, No. 02-ML-1475 DT,  
14 2005 WL 1594403, at \*19 (C.D. Cal. June 10, 2005). The courts consider counsel's  
15 skill alongside the quality of work performed by counsel. *See In re Omnivision*  
16 *Technologies, Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008).

17  
18 In this case, success required experienced and skilled class-action attorneys.  
19 Class Counsel are members of the bar with vast experience in consumer class-action  
20 litigation, which they utilized to obtain the best recovery for the Class. (Carey Decl.  
21 ¶¶ 1, 14.) This case is factually complex and involved numerous legal questions  
22 involving the scope of federal vehicle-safety regulations, standing issues for  
23

24  
25 <sup>17</sup> In *Roy v. Hyundai Motor America*, No. 05-cv-483, Order Granting Mot. Att'ys'  
26 Fees, Apr. 10, 2006 (C.D. Cal.), the plaintiff sued Hyundai on behalf of a class of  
27 2004-2006 Hyundai Elantra owners and lessees who were experiencing the OCS  
28 issue in their vehicles. The subsequent settlement was granted final approval, and  
the Court awarded attorneys' fees and expenses in the amount of \$1.2 million  
(representing a \$618,391 lodestar with a 1.9 multiplier, and \$28,475 in costs). (*See*  
Exhibit 4.)



1 California consumer claims, and arguments regarding the applicability of warranty  
2 claims. Yet Class Counsel defeated HMA's second motion to dismiss its SAC and  
3 negotiated a beneficial settlement for the Class.

4 The Court should consider the quality of opposing counsel in evaluating the  
5 quality of Class Counsel's work. *In re Heritage Bond Litig.*, 2005 WL 1594403, at  
6 \*20. Class Counsel faced Hogan & Lovells—a highly skilled law firm with a well-  
7 deserved reputation for vigorous advocacy in the defense of its clients. *See id.*

8  
9 **(c) Class Counsel Obtained a Favorable Result for the**  
10 **Settlement Class**

11 Class Counsel negotiated a favorable settlement for a large Class while  
12 addressing a fundamental safety-related defect. *See Graham v. DaimlerChrysler*  
13 *Corp.*, 34 Cal. 4th 553, 578 (2004). The substantial benefit doctrine applies when “a  
14 concrete and significant benefit, although nonmonetary in nature, has nonetheless  
15 been conferred on an ascertainable class.” *Consumer Cause, Inc. v. Mrs. Gooch's*  
16 *Natural Food Markets, Inc.*, 127 Cal. App. 4th 387, 397, 25 Cal. Rptr. 3d 514, 520  
17 (2005)).

18  
19 This settlement will confer both nonmonetary and monetary benefits on  
20 660,000 Hyundai owners and lessees by the Settlement. The Settlement makes  
21 available (1) an OCS recalibration in most of the Class Vehicles (594,000 Sonatas  
22 and Santa Fes); (2) a sticker providing notification of the recalibration for those  
23 vehicles; (3) the potential vehicle buyback or exchange program to all Class  
24 Members; and (4) arbitration regarding eligibility in the buyback/exchange program.  
25 The Settlement notifies the Class of a possible safety concern and eliminates that  
26 concern by recalibrating Hyundai vehicles that suffer from OCS misclassification  
27  
28

1 issues or potentially permitting Class Members to rid themselves of Class Vehicles  
2 that are still experiencing OCS issues.

3       The costs of the benefits provided to the Class demonstrate the value of the  
4 Settlement. Class Counsel was, in their opinion, primarily responsible for the recall  
5 initiated on Santa Fes by HMA in 2012, and the labor cost alone to HMA for the  
6 updated calibration on the OCS in Santa Fes is \$29.76.<sup>18</sup> (Carey Decl. ¶ 2.) As of  
7 January 23, 2013, the date of the most recent quarterly report HMA filed with  
8 NHTSA, HMA had recalibrated 82,070 Santa Fes—that is nearly \$2.5 million solely  
9 in labor costs only for the Santa Fes. (*Id.*) This amount does not include HMA’s  
10 development cost of the calibration software, nor does it include the recalibration  
11 costs of the Sonatas or the substantial costs that will be borne by HMA for those  
12 Class Members who participate in the vehicle buyback/exchange program or  
13 exercise the arbitration option. (*Id.*) These benefit costs would provide a “common  
14 fund” of at least \$4.9 million (*Id.*), making Class Counsel’s request for \$993,000 in  
15 fees and expenses well within the Ninth Circuit’s 25% benchmark for fees. *See*  
16 *Hanlon*, 150 F.3d at 1029. This Settlement remediates the defect and provides  
17 significant monetary and nonmonetary relief to members of the Class.  
18  
19  
20

21                   **(d) The Contingent Nature of the Litigation**

22       In conducting an inquiry into whether counsel’s hours were reasonably  
23 expended in this litigation, the Court may consider the contingent nature of the fee  
24 agreement. *Montoya v. Creditors Interchange Receivable Mgmt., LLC*, No. CV 10-  
25 3037 PSG (Ex), 2011 WL 2437474, at \*2 (C.D. Cal. June 17, 2011). Class Counsel  
26

27  
28       <sup>18</sup> The cost of the OCS recalibration of one Sonata is \$199.52. (Carey Decl. ¶ 2.)

1 pursued this case on a contingency basis. (Carey Decl. ¶ 18.) Class Counsel have  
2 expended many hours working on this case and born all expenses and risks of the  
3 litigation—the Class Representatives and Class Members are not responsible for any  
4 fees or costs. (*Id.*) The contingent nature of this litigation supports the  
5 reasonableness of the hours expended by Class Counsel.  
6

7 **4. The Factors Not Subsumed in the Lodestar Analysis Support**  
8 **Any Multiplier Needed to Approve this Fee Request**

9 The factors that are not subsumed in the lodestar analysis may support a  
10 multiplier. *Cunningham v. Cnty. of Los Angeles*, 879 F.2d 481, 487 (9th Cir. 1988).  
11 These factors include the time and labor required, the preclusion of other  
12 employment by the attorney due to acceptance of the case, the customary fee, time  
13 limitations imposed by the client or the circumstances, the nature and length of the  
14 professional relationship with the client, and awards in similar cases. *See Morales*,  
15 96 F.3d at 363 n.8, 364 n.9. These factors weigh in favor of any multiplier necessary  
16 to award Class Counsel the agreed-upon fee amount.  
17

18 The time and labor required to bring this Litigation to a reasonable settlement  
19 was substantial. Class Counsel have expended 1,550 hours during the course of the  
20 suit and the months-long settlement negotiations. (Carey Decl. ¶¶ 4, 18.) As a result  
21 of Class Counsel's perseverance in bringing the defect to light and seeking relief for  
22 all purchasers of Hyundai models with the OCS defect, the type and availability of  
23 relief was vastly expanded to consumers throughout the United States.  
24

25 The work involved in successfully litigating this action over several years  
26 caused Class Counsel to forego the pursuit of other employment. (Carey Decl. ¶  
27 19.) Class Counsel is a nationwide firm specializing in class actions, and it must  
28

1 allocate its resources carefully to investigate and initiate suits it believes are  
2 worthwhile. (*Id.*) This Litigation resulted in a significant expenditure of time and  
3 money—an expenditure that limited Class Counsel’s pursuit of other cases. (*Id.* ¶¶  
4 4, 7, 19.)

5  
6 An award in the amount of Class Counsel’s lodestar plus expected costs of  
7 completion, or alternatively, a fair multiplier of Class Counsel’s lodestar, assuming  
8 the Court trims back the projected maximum, which also supports approval. *Id.* See  
9 also *supra* Parts III.A. and III.B.1. Awards granted in similar cases demonstrate that  
10 Class Counsel’s request for its estimated lodestar (or, if needed, a modest multiplier  
11 of the lodestar to grant the fee award). See *Common Cause*, 235 F. Supp. 2d at 1081-  
12 82 (award of \$1,063,087.29 for 3,345.8 hours); *Van Vranken*, 901 F. Supp. At 298  
13 (3-4 is typical range for multipliers). See also *supra* Parts I. and III.B.2.

14  
15 **C. Class Counsel Seeks Reimbursement of Litigation Costs and**  
16 **Expenses Not to Exceed \$58,000.00**

17 Class Counsel has incurred expenses in the amount of \$45,855.71. These  
18 expenses are detailed in Class Counsel’s declarations submitted concurrently  
19 herewith. (Carey Decl. ¶¶ 5-7.) Class Counsel estimates that it will expend  
20 approximately \$12,000.00 more in costs before the close of the Litigation. (*Id.* ¶ 5.)

21 All expenses that are typically billed by attorneys to paying clients in the  
22 marketplace are compensable. See *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 286  
23 (1989); accord *Grove v. Wells Fargo Fin. California, Inc.*, 606 F.3d 577, 580 (9th  
24 Cir. 2010). See also *Omnivision*, 559 F. Supp. 2d at 1048 (“[a]ttorneys may recover  
25 their reasonable expenses that would typically be billed to paying clients in  
26 noncontingency matters”).  
27  
28

1 As detailed in the Declarations of Class Counsel, Plaintiffs incurred  
2 substantial costs on motions practice, travel, computer research, photocopies,  
3 postage, filing fees, and telephone charges. (*Id.* ¶ 5.) There were multiple settlement  
4 meetings—including the mediation—for which Class Counsel had to travel, and  
5 charges for computerized factual and legal research included online legal services  
6 such as LEXIS/Nexis. (*Id.* ¶¶ 3, 5, 15.) These costs were necessarily and reasonably  
7 incurred to bring this case to a successful outcome, and reflect market rates for the  
8 various categories of expenses incurred.  
9

10 **D. The Class Representatives Should Each Receive \$2,500 Incentive**  
11 **Award Payments**

12 “Incentive awards are fairly typical in class action cases.” *Rodriguez v. W.*  
13 *Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (*citing* 4 ALBA CONTE ET AL.,  
14 NEWBERG ON CLASS ACTIONS § 11:38 (4th ed. 2008). These awards, generally  
15 sought after a settlement has been reached, “compensate class representatives for  
16 work done on behalf of the class, to make up for financial or reputational risk  
17 undertaken in bringing the action, and, sometimes, to recognize their willingness to  
18 act as a private attorney general.” *Rodriguez*, 563 F.3d at 958-59. The Court has  
19 discretion to approve incentive awards and its consideration includes factors such as  
20 the amount of time and effort spent by the class representatives, the duration of the  
21 litigation, and the personal benefit (or lack thereof) enjoyed by the class  
22 representatives as a result of the litigation. *Wilson v. Airborne, Inc.*, No. EDCV 07-  
23 770-VAP (OPx), 2008 WL 3854963, at \*12 (C.D. Cal. Aug. 13, 2008).  
24  
25

26 The Class Representatives have devoted considerable time to this Litigation,  
27 including developing the claims and theories prior to filing suit. Plaintiffs  
28

1 Christopher and Nancy Kearney sought out Class Counsel and requested that they  
2 look into the OCS issue in their Sonata. (Carey Decl. ¶ 9.) Plaintiff Nancy Kearney  
3 also investigated the OCS defect and gathered information from other Hyundai  
4 owners. (*Id.* ¶ 8.) And Plaintiffs Charles and Shari Moore contacted Class Counsel  
5 to inform them of the accident involving their Santa Fe in which the OCS defect  
6 resulted in serious injury to their small-stature adult daughter. (*Id.* ¶ 9.)  
7  
8 Notwithstanding this initial involvement, the Class Representatives assisted Class  
9 Counsel in gathering facts for this case, being available and responsive for multiple  
10 communications with Class Counsel, and reviewing pleadings and discovery. (*Id.* ¶  
11 8.) Furthermore, the awards are modest compared with incentive awards in other  
12 cases. *See, e.g., Singer v. Becton Dickinson & Co.*, 2010 U.S. Dist. LEXIS 53416, at  
13 \*18-19 (S.D. Cal. June 1, 2010) (\$25,000 award); *Ingram v. Coca-Cola Co.*, 200  
14 F.R.D. 685, 694 (N.D. Ga. 2001) (\$300,000 award).  
15

16 Finally, HMA agreed to pay these incentive awards, separate and apart from  
17 the relief provided to the Settlement Class, and their payment will not reduce or  
18 otherwise impact any monetary or other benefit provided to the Settlement Class.  
19

20 **E. Negotiated Attorneys' Fee Agreements Are Favored in Class Action  
21 Settlements**

22 Federal courts encourage litigants to resolve fee issues by agreement whenever  
23 possible. "A request for attorney's fees should not result in a second major  
24 litigation. Ideally, of course, litigants will settle the amount of a fee."<sup>19</sup>

25  
26 <sup>19</sup> *Hensley*, 461 U.S. at 437; *see also In re M.D.C. Holdings Sec. Litig.*, No.  
27 CV89-0090 E (M), 1990 WL 454747, at \*4, 1990 U.S. Dist. LEXIS 15488, at \*12  
28 (S.D. Cal. Aug. 30, 1990) ("...the parties should be encouraged to settle all their  
disputes as part of the settlement...including the amount of the fee...[and] it should  
be approved as part of the negotiated settlement").

1 A fee negotiated by the parties at arm's-length is essentially a market-set price.  
2 Defendants have an interest in minimizing the fee; plaintiffs have an interest in  
3 maximizing it; and the negotiations are informed by the parties' knowledge of the  
4 work done and result achieved, and their views on what the court might award if the  
5 matter were litigated. In *In re Cont'l Ill. Secs. Litig.*, Judge Posner endorsed a  
6 market-based approach to evaluating fee requests, stating that the function of judges  
7 in fee litigation "is to determine what the lawyer would receive if he were selling his  
8 services in the market rather than being paid by court order." *In re Cont'l Ill. Secs.*  
9 *Litig.*, 962 F.2d 566, 568 (7th Cir. 1992).

11 Here, an arms'-length negotiation was conducted, and HMA agreed to a  
12 payment of \$993,000 in fees and costs and \$2,500 to each of the four Class  
13 Representatives. (Carey Decl. ¶ 3.) Moreover, an experienced mediator oversaw the  
14 negotiations and the final terms of the Settlement, further demonstrating the  
15 reasonableness of Plaintiffs' request.

#### 17 **IV. CONCLUSION**

18 For the foregoing reasons, Plaintiffs respectfully request that the Court award  
19 their counsel \$993,000 in attorneys' fees and expenses, and the Court award the  
20 Class Representatives \$2,500 each in incentive awards.

22 Respectfully submitted,

23 DATED: April 25, 2013

By: /s/Robert B. Carey

24 Robert B. Carey\*  
25 HAGENS BERMAN SOBOL SHAPIRO  
26 LLP  
27 11 West Jefferson Street, Suite 1000  
28 Phoenix, AZ 85003  
Tel. (602) 840-5900



Fax (602) 840-3012  
E-mail: [rob@hbsslaw.com](mailto:rob@hbsslaw.com)

Elaine T. Byszewski (SBN 222304)  
Lee M. Gordon (SBN 174168)  
HAGENS BERMAN SOBOL SHAPIRO  
LLP  
301 North Lake Avenue, Suite 203  
Pasadena, CA 91101  
Tel. (213) 330-7150  
Fax (213) 330-7152  
E-mail: [elaine@hbsslaw.com](mailto:elaine@hbsslaw.com)

Steve W. Berman\*  
HAGENS BERMAN SOBOL SHAPIRO  
LLP  
1918 Eighth Avenue, Suite 3300  
Seattle, WA 98101  
Tel. (206) 623-7292  
Fax (206) 623-0594  
E-mail: [steve@hbsslaw.com](mailto:steve@hbsslaw.com)

\* *admitted pro hac vice*



**PROOF OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on April 25, 2013.

/s/ Robert B. Carey

Robert B. Carey